Supreme Court, U.S.
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Nos. 05-361 & 05-368

IN THE

Supreme Court of the United States

LEE KARR,

Petitioner,

-and-

JOSEPH DALTON, *et al.*,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), authorizes the conduct of Class III gaming on Indian lands pursuant to a Tribal-State compact where the State permits casino-style gaming "for any purpose by any person," regardless of State law restrictions on such gaming.

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STATEMENT OF THE CASE

Petitioners Lee Karr and Joseph Dalton, *et al.* challenge the constitutionality of a New York statute authorizing the Governor of New York State to enter into four Tribal-State compacts governing gaming on Indian lands, pursuant to the Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988), *codified at* 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166 *et seq.* Petitioners contended that the provision at issue violated state constitutional restrictions on gaming, and that IGRA did not preempt these restrictions. The New York Court of Appeals rejected these arguments, holding that IGRA preempts state law with respect to gaming on Indian lands, and that because New York law permits casino-style gaming for certain purposes by certain persons, IGRA authorizes such gaming on Indian lands pursuant to a Tribal-State compact.[1]

A. Statutory Background

IGRA, the federal statute that defines the scope of state regulatory authority over Indian gaming, was enacted in response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). There, the Court held that under then existing federal law, the State of California lacked authority to enforce on Indian reservations state law regulating the playing of bingo. "[T]ribal

1. Petitioners also challenged two other provisions, which authorize the use of video lottery terminals at certain parimutuel racetracks and the State's participation in the multi-state "Mega Millions" lottery. The New York Court of Appeals rejected these challenges on state law grounds. Petitioners seek review by this Court only of that aspect of the decision below regarding Tribal-State compact negotiations.

sovereignty," the Court explained, "is dependent on, and subordinate to, only the Federal Government, not the States. It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* at 207 (internal quotation marks and citation omitted).

Under federal law, the Court determined, the applicability of state law on Indian reservations turned on whether the law to be applied was "criminal/prohibitory" or "civil/regulatory." Criminal/prohibitory state laws, which "generally . . . prohibit certain conduct," could be enforced on reservations; civil/regulatory laws, which "generally permit[] the conduct at issue, subject to regulation," could not be. *Id.* at 209. California's gaming laws, which permitted bingo if net proceeds were used for charitable purposes, and which authorized a state-run lottery, were held to be civil/regulatory and therefore unenforceable: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211. Thus, under *Cabazon Band*, state regulatory authority over Indian gaming was quite constrained; unless state law banned gaming activities altogether, it was unenforceable as to gaming on Indian lands.

IGRA, which was enacted the following year, preempts state law in the field of Indian gaming. It makes *Cabazon Band*'s criminal/prohibitory-civil/regulatory distinction the touchstone of whether, as a matter of *federal* law, casino-style gaming will be permitted on Indian lands.

See S. Rep. No. 446, 100th Cong., 2d Sess. 6 ("S. Rep."), *reprinted in* 1988 U.S. Code Cong. & Adm. News ("U.S.C.C.A.N.") 3071, 3076. Specifically, IGRA provides that such gaming "shall be lawful on Indian lands" if, among other factors, the lands are "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

IGRA nonetheless gives the States a means to influence the conduct of casino-style gaming (denominated in the statute as "Class III" gaming) on Indian lands — the type of gaming at issue here.[2] IGRA requires that such gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Through the compacting process, Tribes and States may negotiate and agree upon regulatory, jurisdictional, and other issues pertaining to the conduct of Class III gaming on Indian lands.

Upon request by a Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). IGRA creates a federal cause of action against States that fail to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A). However, because IGRA does not abrogate the States' Eleventh Amendment immunity, no such action may proceed to judgment against an unconsenting State. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). States that decline to participate in the compacting process, however, ultimately forfeit the opportunity to influence Class III gaming, and the terms of such gaming

2. Class III gaming includes any "house banking game," such as blackjack, roulette, and baccarat, as well as parimutuel horse and dog racing, lotteries, and certain other games. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

will be prescribed by the Secretary of the Interior. 25 U.S.C. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291.

In October 1993, then Governor Cuomo entered into the "Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York," which set forth terms for the conduct of Class III gaming on the Akwesasne Reservation in Franklin County, New York. That compact was subsequently invalidated by the New York Court of Appeals because it had been entered into without legislative authorization. *See Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y. 2d 801, 798 N.E.2d 1047 (2003).

The statute challenged in this litigation, New York Executive Law § 12, provides the legislative authorization for Tribal-State compacts that was deemed necessary by the Court of Appeals in *Saratoga*. Enacted in October 2001, the statute authorizes the Governor, on behalf of the State, to execute up to four Tribal-State compacts pursuant to IGRA. The compacts are deemed ratified upon the Governor's certification of certain enumerated conditions concerning protections for labor unions and visitors to gaming facilities. *See* N.Y. Exec. Law § 12.

B. Procedural History

Petitioners commenced two separate actions, later consolidated, in New York Supreme Court, Albany County, alleging that New York Executive Law § 12 violates Article I, § 9 of the state Constitution. That provision prohibits some gaming, but allows, subject to certain restrictions, state-run lotteries, parimutuel horse racing, and gaming conducted by religious or charitable organizations. N.Y. Const. art. I, § 9.

On cross-motions for summary judgment, Supreme Court dismissed the complaints. *See* Dalton Pet. App. at 132a-144a. The trial court's grant of summary judgment on the compacting provision was affirmed by the intermediate appellate court, *see id.* at 76a-131a, and by the New York Court of Appeals, *see id.* at 6a-75a. The state Court of Appeals first noted that IGRA "'expressly preempt[s] the field in the governance of gaming activities on Indian lands.'" *Id.* at 15a (quoting S. Rep. at 6, 1988 U.S.C.C.A.N. at 3076). While Tribal-State compacts negotiated pursuant to IGRA provide States some measure of influence over Class III gaming, the court noted, IGRA does not permit States to unilaterally regulate Indian gaming activities. *Id.* at 14a.

In light of IGRA's provision stating that Class III gaming is permitted on Indian lands in States that allow such gaming "for any purpose by any person," 25 U.S.C. § 2710(d)(1)(B), the court determined that "[s]ince New York allows some forms of Class III gaming — for charitable purposes — such gaming may lawfully be conducted on Indian lands" so long as IGRA's remaining requirements are satisfied. Dalton Pet. App. at 16a. As for petitioners' suggestion that IGRA may not, consistent with the Tenth Amendment, compel a State to enter a Tribal-State compact, the court explained that entry into a compact is indeed optional for a State. It is, however, an option "to be favored" because States that decline to participate in compact negotiations forego any influence over the conduct of Class III gaming on Indian lands. *Id.* at 17a-19a.

Petitioners filed motions for reargument, which were denied by order dated July 6, 2005. *Id.* at 1a. These petitions followed.

REASONS FOR DENYING THE PETITIONS

Petitioner Dalton's contention that there is widespread conflict among appellate courts regarding the extent of IGRA preemption rests primarily on a purported conflict between the New York Court of Appeals' decision below and the California Supreme Court's decision in *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585, 981 P.2d 990 (1999) ("*H.E.R.E.*"). But the state constitutional provision applied in *H.E.R.E.* has been amended for the specific purpose of nullifying *H.E.R.E.*'s result. For all relevant purposes, *H.E.R.E.* thus has no continuing force or effect.

The other cases relied on by petitioner Dalton present no conflict with the New York Court of Appeals' decision in either reasoning or result. Indeed, apart from *H.E.R.E.*, all of the cases cited by petitioner as evidence of a putative conflict are in broad agreement with the New York Court of Appeals' view of IGRA and its preemptive effect.

Both petitioners' remaining arguments boil down to the claim that the New York Court of Appeals incorrectly applied settled law and principles of federalism. The decision below, however, was fully consistent with the precedent of this Court. In any event, petitioners' request for error correction does not merit this Court's attention.

I. PETITIONERS HAVE NOT IDENTIFIED A CONFLICT THAT MERITS THIS COURT'S REVIEW

A. The California Supreme Court Decision on which Petitioner Dalton Primarily Relies Has Been Nullified by Constitutional Amendment.

Petitioner Dalton suggests that this Court's review is necessary to resolve a putative conflict between the New York Court of Appeals' decision and *H.E.R.E.* — a California Supreme Court decision that has no continuing force or effect. Dalton Pet. at 11-13. *H.E.R.E.* concerned a challenge to a California statutory initiative directing the governor to enter into certain Tribal-State compacts pursuant to IGRA. The California Supreme Court invalidated the statute, finding it in violation of a state constitutional provision prohibiting "casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e). Despite the express statements in IGRA's text and legislative history indicating Congress's intent to preempt state regulation of Indian gaming, the court held that "IGRA does not exempt gambling on Indian lands from state regulatory laws," and concluded that the state Constitution prohibited California from entering into Tribal-State compacts as directed by the statute. *See H.E.R.E.*, 21 Cal. 4th at 611-12, 981 P.2d at 1008-09.

In March 2000, approximately seven months after *H.E.R.E.* was decided, California voters ratified Proposition 1A, which amended the state Constitution for the specific purpose of nullifying *H.E.R.E.*'s result. As amended, the California Constitution expressly authorizes the governor "to negotiate and conclude compacts, subject to ratification by the Legislature," for the conduct of certain Class III gaming

on Indian lands. Cal. Const. art. IV, § 19(f). It further provides that such gaming is "hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Id.* Since the amendment was ratified, California has entered into at least sixty-two Tribal-State compacts, and "[c]asinos have become the main source of revenue for Indian tribes in California." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 718 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).

Because the California Constitution can no longer be read to prevent Class III gaming on Indian lands nor prohibit California from entering Tribal-State compacts, *H.E.R.E.* is for all relevant purposes a nullity. A purported "conflict" with a decision that has no continuing force or effect is not a compelling reason meriting this Court's review. *See Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992).[3]

B. The Remaining Cases Relied on by Petitioner Dalton in No Way Conflict with the Decision Below.

Apart from *H.E.R.E.*, petitioner Dalton points to four categories of cases that are putatively in conflict with the

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3. It is far from clear that *H.E.R.E.* was ever actually in conflict with the decision below. The statute invalidated in *H.E.R.E.* directed the governor to enter into Tribal-State compacts for the conduct of, *inter alia*, "banked" casino-style gaming — Class III gaming that was then categorically prohibited by the California Constitution for all purposes and by all persons. *See H.E.R.E.*, 21 Cal. 4th at 605-09, 981 P.2d at 1004-07. Thus, the compacts entered into pursuant to that statute would have resulted in Class III gaming not actually authorized by IGRA. *See* 25 U.S.C. § 2710(d)(1)(B). The New York Constitution, in contrast, permits the playing of a wide variety of banked casino-style Class III games by charitable or religious organizations.

decision below: (1) state high court decisions concluding, as the New York Court of Appeals did in *Saratoga*, that a governor may not enter a Tribal-State compact without legislative authorization; (2) *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005), which did not even address IGRA's Tribal-State compact procedure; (3) decisions from the Eighth and Tenth Circuits recognizing, as the New York Court of Appeals did below, that IGRA does not compel a State to enter a Tribal-State compact; and (4) federal appellate decisions concerning an issue that the court below expressly declined to reach. None of these cases conflicts with the decision below in any respect.

Petitioner Dalton first relies on three state Supreme Court decisions, *Srader v. Verant*, 1998-NMSC-25, 125 N.M. 521, 964 P.2d 82 (1998); *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992); and *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280 (R.I. 1995). *See* Dalton Pet. at 12. Those cases held (or reaffirmed) that a governor may not execute a Tribal-State compact on behalf of a State without legislative authorization to do so. The New York Court of Appeals held precisely the same thing in *Saratoga* — which the decision below recognizes as good law, *see* Dalton Pet. App. at 7a, 20a; indeed, in *Saratoga*, the court expressly noted its agreement with the very decisions that petitioners cite as giving rise to a putative conflict. *See Saratoga*, 100 N.Y.2d at 824, 798 N.E.2d at 1061 (noting that the New York Court of Appeals "join[s]" New Mexico, Kansas, and Rhode Island in concluding that Tribal-State compacts require legislative authorization).

Petitioner Dalton next relies on *Lac Courte Oreilles*, *see* Dalton Pet. at 12-13, in which the Seventh Circuit upheld a provision of IGRA making Class III gaming on "after-acquired lands" — *i.e.*, Indian lands acquired after IGRA's enactment — conditional on the concurrence of the governor of the State in which the gaming is to occur. *See* 25 U.S.C. § 2719(b)(1)(A). The plaintiff Tribes had argued that because the decision to permit gaming on after-acquired lands is a legislative function, IGRA offended principles of federalism by vesting that function in a state executive officer. The Seventh Circuit explained that "Wisconsin has already established [a gaming policy] through legislation and amendments to the Wisconsin Constitution." *Lac Courte Oreilles*, 367 F.3d at 664. The governor's decision whether to concur to a proposal for gaming on after-acquired lands, the court concluded, "will be informed by the [State's existing] public policy" — a "policy of tolerating gaming on Indian lands" despite Wisconsin's prohibition of casino gaming elsewhere in the State. *Id.* Thus, not only did *Lac Courte Oreilles* say nothing about whether state-law gaming restrictions prevent a State from entering into Tribal-State compacts under IGRA, but its view of the interplay between IGRA and state gaming policy is fully consistent with the decision below.

Third, petitioner Dalton points to *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *vacated and remanded*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); and *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D. Ariz. 1992), as conflicting with the decision below. *See* Dalton Pet. at 13. Petitioner concedes that these cases address not the question squarely presented here but only "closely related issues" — *i.e.*, "that states are not required under IGRA to enter into compacts

with Indian tribes" and that such a requirement, if imposed, would violate the Tenth Amendment. Dalton Pet. at 13. In any event, these decisions are in complete accord with the New York Court of Appeals' view that a State is not compelled to enter a Tribal-State compact, and that if it declines to do so, the terms of Class III gaming on Indian lands would be prescribed without the State's involvement. *See* Dalton Pet. App. at 17a-19a.[4]

Finally, petitioner Dalton contends that "[o]ther circuits have disagreed" not with the decision below but with a Second Circuit decision sometimes read to mean that if a State permits any form of Class III gaming, it must negotiate over all forms of Class III gaming. Dalton Pet. at 13-14; *see also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310-11 (10th Cir. 2004) (noting disagreement). Because the New York Court of Appeals expressly declined to reach this question, *see* Dalton Pet. App. at 16a n.4, any conflict over it cannot serve as grounds for granting certiorari in this case.[5]

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4. Because the New York Court of Appeals determined that IGRA does not compel a State to enter a Tribal-State compact, it did not comment on whether such a requirement, if imposed, would violate the Tenth Amendment. *See* Dalton Pet. App. at 17a-19a.

5. Petitioner Dalton notes that this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. __, 125 S. Ct. 1478 (2005) "makes it abundantly clear that state regulatory laws do apply to land that may be owned by Indians in fee simple but which does not enjoy 'reservation' or 'land in trust' status." Dalton Pet. at 11 n.4.

(Cont'd)

II. THE DECISION BELOW WAS CORRECT

Despite petitioners' lengthy attacks on the merits of the New York Court of Appeals' decision, this case was rightly decided below. First, petitioners contend that IGRA unconstitutionally compels States in which Class III gaming is permitted to participate in a federal regulatory program. *See* Dalton Pet. at 2-5, 19-21; Karr Pet. at 2-8, 13-19. No court has agreed with petitioners that IGRA's Tribal-State compact provision violates the Tenth Amendment, and with good reason. IGRA "grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe*, 517 U.S. at 58. But, as the New York Court of Appeals and other courts have concluded, IGRA does not compel a State to use that power. Should a State decline to participate in the compacting process, then the State simply forfeits the opportunity to influence Class III gaming on Indian lands, and the terms of such gaming will be prescribed by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291; *cf.* Karr Pet. at 16. The Tenth Amendment does not prevent Congress from giving States the option of acting in a field otherwise governed by federal law. *See New York v. United States*, 505 U.S. 144, 167 (1992) (recognizing "Congress' power to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation"). IGRA is therefore fully consistent with the Tenth Amendment, as courts have uniformly held.

(Cont'd)
That proposition is of no consequence here. IGRA never purports to authorize Class III gaming on territory other than Indian lands, and the New York Court of Appeals did not suggest otherwise. *See* Dalton Pet. App. at 20a n.6.

See Ponca Tribe, 37 F.3d at 1434; *Cheyenne River*, 3 F.3d at 281.

Second, petitioners argue that New York's constitutional restrictions on for-profit gaming preclude Class III gaming on Indian lands pursuant to a Tribal-State compact, notwithstanding IGRA. *See* Dalton Pet. at 4, 17-18; Karr Pet. at 19-21. To the extent this claim turns on an interpretation of the New York Constitution, it is not appropriately addressed to this Court. To the extent the claim turns on an interpretation of federal law, it is incorrect. State gaming law has no force or effect on Indian lands except insofar as Congress may provide. *Cabazon Band*, 480 U.S. at 207. IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands," S. Rep. at 6, 1988 U.S.C.C.A.N. at 3076, and provides that in States, such as New York, which permit Class III gaming for charitable purposes, such gaming may be conducted on Indian lands. 25 U.S.C. § 2710(d)(1)(B). Thus, contrary to petitioners' assertion, New York state law is not a bar to the conduct of Class III gaming on Indian lands. *See* Dalton Pet. App. at 16a-18a; *Northern Arapaho Tribe*, 389 F.3d at 1311-12; *Mashantucket*, 913 F.2d at 1030-31; *cf. United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990).

Third, petitioners urge this Court to hold — "[c]ontrary to the uniform decisions of courts," Karr Pet. at 22 — that IGRA did not incorporate *Cabazon Band*'s criminal/prohibitory-civil/regulatory distinction for Class III gaming. *See* Dalton Pet. at 21-23; Karr Pet. at 21-27. Their position is wrong, *see, e.g.*, Dalton Pet. App. at 15a & n.3; *Mashantucket*, 913 F.2d at 1030; *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1275 & n.6 (D. Idaho 1994); and

in any event irrelevant. The provenance of IGRA's standard for authorizing Class III gaming is of no consequence. The statutory language is clear: Class III gaming may be conducted on Indian lands "located in a State that permits such gaming for any purpose by any person." 25 U.S.C. § 2710(d)(1)(B). Because New York is undisputedly such a State, Class III gaming may be conducted in New York pursuant to a Tribal-State compact.

Finally, petitioners claim that the question presented is of "great national importance." Dalton Pet. at 15; *see* Karr Pet. at 3 ("critical significance"). To be sure, the opportunity that IGRA provides States to influence the conduct of Class III gaming on Indian lands is critical for the States. But not a single State has joined petitioners to seek review of the decision below. That is unsurprising, since the New York Court of Appeals' understanding of IGRA's preemptive sweep is correct and accords with the views of other federal and state courts regarding whether IGRA in fact compels compact negotiation by States. Thus, petitioners have identified no ground that would warrant this Court's departure from its usual practice of refusing to grant certiorari simply to review the merits of the decision below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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